THE COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF
TELECOMMUNICATIONS & ENERGY

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Re: SBC Telecom, Inc.
Motions for Confidential Treatment of Customer Specific Pricing Contracts

Dear Attorneys:

I. INTRODUCTION

Between May 7, 2004, and November 15, 2005[1], SBC Telecom, Inc. ("SBC" or "Company") filed with the Department of Telecommunications and Energy ("Department") nine motions for protective order to limit the availability of information related to customer

[1] Motions were submitted on May 7, 2004, July 14, 2004, November 22, 2004, November 23, 2004, January 27, 2005, March 10, 2005, May 23, 2005, August 5, 2005, and November 14, 2005. The Motions are identical except for the date filed and the particular CSP tariff filing to which they refer.

specific pricing contract ("CSP") tariff filings[2] ("Motions") for SBC Long Distance, LLC. In its Motions, SBC requests that the Department grant protective treatment for the CSP contracts executed by the Company and customers (see, e.g., May 23, 2005 Motion at 1). In essence, SBC asks that the CSP contracts be treated as exempt from the public inspection and copying requirements of G.L. c. 66, § 10, concerning public records. SBC requests that the Department protect the customer names in the CSP tariff filings and the entire CSP contracts from public disclosure for the duration of the underlying contracts (see, e.g., id. at 2-3).

SBC sets forth three arguments in support of its request for confidential treatment. First, SBC asserts that the customer names and the entire CSP contracts in its CSP tariff filings are confidential, competitively sensitive, and proprietary information (see, e.g., id. at 2). Specifically, SBC argues that revelation of customer identity linked with a description of particular services and prices would allow SBC's competitors to use the information to underbid the same services to the same customers, thereby undermining SBC's competitive position in the market (see, e.g., id. at 3). Second, SBC contends that customer names should be protected to avoid revelation of information in the CSP tariff filings that may be competitively sensitive to the particular customer (see, e.g., id. at 3). Finally, SBC asserts that the customer names constitute trade secrets (see, e.g., id. at 4). SBC states that the names specifically meet the criteria that Massachusetts courts use to determine the existence of a trade secret as set forth in Jet Spray Cooler, Inc. v. Crampton, 361 Mass. 835 (1972) (see, e.g., id.).

II. STANDARD OF REVIEW

Information filed with the Department may be protected from public disclosure pursuant to G.L. c. 25, § 5D, which states in part that:

> The [D]epartment may protect from public disclosure, trade secrets, confidential, competitively sensitive or other proprietary information provided in the course of

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[2] CSP tariff filings are also referred to as contract service arrangements ("CSAs"), special pricing arrangements ("SPAs"), and individual case basis ("ICB") rates. See DTE Notice to Massachusetts Telecommunications Carriers, Use of Contract Service Arrangements (April 6, 2004) ("CSA Notice"). The Department uses the term "CSP tariff filing" to refer to the package of materials the Department requires to be filed to document a variation from a carrier's standard tariff offering. A CSP tariff filing must include the following: (1) a copy of the CSP contract; (2) a detailed description of services to be offered under the CSP contract; (3) a discussion of the competitive situation that prompted the need for the CSP contract; and (4) tariff language summarizing the major terms and conditions of the CSP contract. CSA Notice at 2.

> proceedings conducted pursuant to this chapter. There shall be a presumption that the information for which such protection is sought is public information and the burden shall be upon the proponent of such protection to prove the need for such protection. Where such a need has been found to exist, the Department shall protect only so much of the information as is necessary to meet such need.

G.L. c. 25, § 5D, permits the Department, in certain narrowly defined circumstances, to grant exemptions from the general statutory mandate that all documents and data received by an agency of the Commonwealth are to be viewed as public records and, therefore, are to be made available for public review. See G.L. c. 66, § 10; G.L. c. 4, § 7, cl. twenty-sixth. Specifically, G.L. c. 25, § 5D, is an exemption recognized by G.L. c. 4, § 7, cl. twenty-sixth(a) ("specifically or by necessary implication exempted from disclosure by statute").

G.L. c. 25, § 5D, establishes a three-part standard for determining whether, and to what extent, information filed by a party in the course of a Department proceeding may be protected from public disclosure. First, the information for which protection is sought must constitute "trade secrets, confidential, competitively sensitive or other proprietary information;" second, the party seeking protection must overcome the G.L. c. 66, § 10, statutory presumption that all such information is public information by "proving" the need for its non-disclosure; and third, even where a party proves such need, the Department may protect only so much of that information as is necessary to meet the established need and may limit the term or length of time such protection will be in effect. See G.L. c. 25, § 5D.

Previous Department applications of the standard set forth in G.L. c. 25, § 5D, reflect the narrow scope of this exemption. See Boston Edison Company: Private Fuel Storage Limited Liability Corporation, D.P.U. 96-113, at 4, Hearing Officer Ruling (March 18, 1997) (exemption denied with respect to the terms and conditions of the requesting party's Limited Liability Company Agreement, notwithstanding requesting party's assertion that such terms were competitively sensitive); see also Standard of Review for Electric Contracts, D.P.U. 96-39, at 2, Letter Order (August 30, 1996) (Department will grant exemption for electricity contract prices, but "[p]roponents will face a more difficult task of overcoming the statutory presumption against the disclosure of other [contract] terms, such as the identity of the customer"); Colonial Gas Company, D.P.U. 96-18, at 4 (1996) (all requests for exemption of terms and conditions of gas supply contracts from public disclosure denied, except for those terms pertaining to pricing). See also Verizon Alternative Regulation Plan, D.T.E. 01-31-Phase I, at 15 (2002) (affording narrow protection from unfair competitive advantage by redacting three percentage figures only from pre-filed testimony); D.T.E. 01-31-Phase I, at 6-10, Interlocutory Order (August 29, 2001) (protecting location of wire centers but not number of business lines by wire center).

All parties are reminded that requests for protective treatment have not and will not be granted automatically by the Department. A party's willingness to enter into a non-disclosure agreement with other parties does not resolve the question of whether the response, once it becomes a public record in one of our proceedings, should be granted protective treatment. In short, what parties may agree to share and the terms of that sharing are not dispositive of the Department's scope of action under G.L. c. 25, § 5D, or c. 66, § 10. See Boston Edison Company, D.T.E. 97-95, Interlocutory Order on (1) Motion for Order on Burden of Proof, (2) Proposed Nondisclosure Agreement, and (3) Requests for Protective Treatment (July 2, 1998).

III. ANALYSIS AND FINDINGS

Based upon review of SBC's Motions as well as the Department's CSP tariff filing requirements, the Department determines that SBC has not met its burden to rebut the statutory presumption in favor of disclosure in G.L. c. 66, § 10, and does not satisfy any basis for nondisclosure status under G.L. c. 4, § 7, cl. twenty-sixth, or G.L. c. 25, § 5D. CSP tariff filings differ from carriers' standard tariff offerings in that the carrier and customer negotiate a specific contract arrangement with rates, terms or conditions different from those contained in the carrier's standard tariff offering.[3] However, CSP tariff filings are similar to carrier's standard tariff offering in that CSP tariff filings are tariff materials subject to the filing requirements of G.L. c. 159, § 19.[4] Pursuant to § 19, a common carrier is specifically required to "keep open to public inspection" its tariff filings.

In its Motions, SBC argues that its competitors will be able to underbid the same services to the same customers, if the customers' names are disclosed in CSP tariff filings (see,

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[3] See generally, Investigation by the Department on Its Own Motion into the Propriety of the Tariff D.P.U. - Mass. - No. 1, Part A, Network Services, Section 1, Sixth Revision of Page 1, Filed with the Department on December 26, 1989, to Become Effective January 25, 1990, by AT&T Communications of New England, D.P.U. 90-24 (1991).

[4] G.L. c. 159, § 19, states in part:

> Every common carrier shall file with the department and shall plainly print and keep open to public inspection schedules showing all rates, joint rates, fares, telephone rentals, tolls, classifications and charges for any service, of every kind rendered or furnished, or to be rendered and furnished, by it within the commonwealth, and all conditions and limitations, rules and regulations and forms of contracts or agreements in any manner affecting the same, in such places, within such time, and in such form and with such detail as the department may order . . . .

e.g., May 23, 2005 Motion at 3). However, in reviewing the CSP tariff filings on file with the Department, we note that standard CSP contract language includes a termination clause which creates a monetary disincentive (including the payment of termination or under-utilization charges) for customers to terminate their CSP contracts with SBC prior to the expiration of the contract term. Therefore, the standard termination clause serves as a counterbalance to any possible loss of SBC's competitive position (i.e., a competitor's underbid for the same services during the contract term). In addition, disclosure is in keeping with the public interest to promote robust competition.

In addition, SBC argues that its customers' interests must be protected and asserts that disclosure of the CSP contract may provide competitively sensitive information about a customer's business operations (see, e.g., id. at 2). However, we determine that SBC has not demonstrated sufficiently how disclosure of the fact that a specific business customer that has entered into a CSP contract with SBC would harm that customer's business interests. We further note that the parties willingness to enter into a confidentiality agreement does not compel the Department to grant confidential treatment.

Moreover, as to SBC's assertion that customer names in CSP tariff filings constitute trade secrets, the Department finds that SBC has not met the burden outlined in Jet Spray Cooler, Inc. v. Crampton, 361 Mass. 835 (1972). With respect to the criteria set forth in Jet Spray Cooler regarding the extent to which the information is known and the measures taken to safeguard the information, the fact that SBC allows access to the CSP contract information only to specific employees (see, e.g., id. at 4) is insufficient to establish that SBC has exercised the required "eternal vigilance" in maintaining secrecy of the customers' names. See Jet Spray Cooler, 361 Mass. at 841, citing J.T. Healy & Sons, Inc. v. James A. Murphy & Sons, Inc., 357 Mass. 728, 738 (1970). As to the Jet Spray Cooler criteria concerning the value of and effort to develop the information, and the ease by which the information could be properly acquired by others, SBC asserts that it has spent significant time and money to develop the customers and that disclosure of the customers' names would provide competitors with an unfair competitive advantage (see, e.g., May 23, 2005 Motion at 4). Because of the reasons stated previously in rejecting SBC's assertions of loss of competitive position (i.e., that standard termination clauses serve as a counterbalance to any possible loss of competitive position), we determine that such an assertion is insufficient to establish that customer names in CSP tariff filings constitute trade secrets or to overcome the statutory requirement that tariffs "shall [be kept] open to public inspection." G.L. c. 159, § 19.

IV. RULING

Accordingly, after due consideration, the Department denies SBC's motions for protective treatment of customer names and CSP contracts in the CSP tariff filings currently on file with the Department.

Under the provision of 220 C.M.R. § 1.06(6)(d)(3), SBC may appeal this Ruling to the full Commission by filing a written appeal with supporting documentation within five (5) days of this Ruling. A copy of this Ruling must accompany any appeal.

Very truly yours,

/s/
Andrew O. Kaplan, General Counsel